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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 | TERRENCE LLOYD HADDIX, JR., No. C-12-1674 EMC (pr)

9 || Plaintiff,

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11 C/O SEAN BURRIS; *et al.*,

12 || Defendants.

ORDER PARTIALLY GRANTING MOTION TO DISMISS

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II. DISCUSSIONA. The First Amendment Claim Is Not Exhausted1. Legal Standards For Non-Exhaustion Motion To Dismiss

A prisoner's failure to exhaust administrative remedies is a matter in abatement. A defendant has the burden of raising and proving the absence of exhaustion, and may do so by way of an unenumerated Rule 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). "In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact." *Id.* at 1119-20, citing *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 369 (9th Cir. 1988). A district court can decide factual issues in a jurisdictional or related type of motion because there is no right to a jury trial as to that portion of the case, unlike the merits of the case (where there is a right to a jury trial). *See id.* *Wyatt* and *Ritza* allow the district court to resolve factual disputes, but only with regard to the exhaustion issue.

2. Analysis

"No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The State of California provides its inmates and parolees the right to appeal administratively "any policy, decision, action, condition, or omission by the department or its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or welfare." Cal. Code Regs., tit. 15, § 3084.1(a). In order to exhaust available administrative remedies within this system, a prisoner must proceed through three levels of appeal: (1) all inmate appeals are submitted and screened at the first level unless the appeal is exempted under the regulation; (2) a dissatisfied prisoner must file a second level appeal to the institution head or designee, and (3) a dissatisfied prisoner must file a third level appeal to the Secretary of the California Department of Corrections and Rehabilitation. *See id.* at § 3084.7; *Woodford v. Ngo*, 548 U.S. 81, 85-86 (2006).

Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). All of the available remedies must be exhausted; those remedies "need not meet

1 federal standards, nor must they be ‘plain, speedy, and effective.’” *Id.* (citation omitted). Even
 2 when the prisoner seeks relief not available in grievance proceedings, notably money damages,
 3 exhaustion is a prerequisite to suit. *Id.*; *Booth v. Churner*, 532 U.S. 731, 741 (2001). The statute
 4 requires “proper exhaustion” of available administrative remedies. *See Woodford v. Ngo*, 548 U.S.
 5 at 93.

6 Defendant demonstrates in his motion to dismiss that Plaintiff did not exhaust administrative
 7 remedies with regard to the First Amendment claim. Defendant presents evidence that the CDCR
 8 keeps records of inmate appeals that made it to the third level review, i.e., the highest level of
 9 review; that Plaintiff had filed several inmate appeals that reached the third level; and that none of
 10 Plaintiff’s inmate appeals that reached the third level concerned Defendant’s alleged confiscation
 11 and/or opening of his mail to the warden. *See* Townsend Decl., ¶¶ 8-9 and Ex. A; Lozano Decl., ¶¶
 12 6-7 and Ex. A.

13 In his opposition to the motion to dismiss, Plaintiff argues that the issue of the mail
 14 opening/confiscation was covered in his inmate appeal because, although he did not pursue the claim
 15 individually, it was “in direct concordance with and is an extension of Plaintiff’s first claim of
 16 retaliation which was addressed and exhausted in his appeal/staff complaint against Defendant. (See
 17 Ex. D.)” Docket # 30 at 3.¹ Plaintiff further contends that the requirement of total exhaustion
 18 creates an undue burden because “numerous violations can be extensions of the first violation” and
 19 this might prevent a litigant from knowing when he has exhausted remedies as to all of a defendant’s
 20 misdeeds. *See id.* Plaintiff’s arguments fail to persuade the Court.

21 Plaintiff’s inmate appeal concerning Defendant did not suffice to exhaust the First
 22 Amendment claim regarding the alleged opening and/or confiscation of Plaintiff’s letter to warden
 23 Lewis. The inmate appeal complained of Defendant’s “order[ing Plaintiff’s] cell striped (sic) and
 24 searched by C/O C. Chavez.” Docket # 18-1 at 42. The inmate appeal did not urge at any level that

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 26 ¹ After the motion to dismiss was fully briefed, Plaintiff submitted a late declaration stating
 27 that he had mentioned the First Amendment mail claim during an interview at the second level
 28 review of his inmate appeal. *See* Docket # 33. Even if believed, this evidence does not help him
 because mentioning a claim at the second level interview does not suffice to exhaust the claim at the
 third level.

1 Defendant had wrongfully opened and/or confiscated Plaintiff's letter to warden Lewis. Although a
2 letter to the warden *was* mentioned in the inmate appeal, no reasonable person would have
3 understood its mention to assert any claim about the letter. In fact, the inmate appeal contradicts the
4 First Amendment claim alleged in the amended complaint by stating that “[t]he warden forwarded
5 my letter to I.G.I sgt. J. Frisk” rather than that the letter was improperly opened or confiscated by
6 Defendant. Docket # 18-1 at 41. If the warden forwarded the letter to Defendant to handle – rather
7 than (as Plaintiff alleged in his amended complaint) Defendant confiscated or improperly opened the
8 letter – there would be no viable First Amendment claim. *See* Docket # 19 at 4.² In short, Plaintiff's
9 statement in his inmate appeal that the warden forwarded a letter to Defendant failed to exhaust his
10 claim that Defendant improperly opened and/or confiscated Plaintiff's letter to the warden.

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13 ² In the Order Permitting Amended Complaint, the Court discussed Plaintiff's First
Amendment claim:

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Haddix alleged [in his amended complaint] that, about a month after he sent a letter to the warden, the letter was returned to him with a typed note from correctional sergeant Frisk that stated, “If you have a complaint against IGI staff, you need to submit a staff complaint to the Appeal coordinator and follow the guidelines set forth in the California Code of Regulations, Title 15, section 3084, Inmate Appeals.” Docket # 18-1, p. 6. Haddix alleged that, because the letter was marked “confidential mail,” it should not have been opened by anyone but the addressee. *Id.* at 6-7. Haddix alleged that Frisk's opening and responding to a confidential letter mailed to the warden “constituted a violation of privileged mail under the 1st Amendment to the United States Constitution.” Docket # 18-1, p. 10. Giving the *pro se* amended complaint the liberal construction to which it is entitled, a cognizable claim is stated for a First Amendment violation, as the amended complaint could be read to mean that sergeant Frisk improperly confiscated the letter. The Court notes, however, that the substance of sergeant Frisk's message – i.e., that Haddix had to follow the regulations for inmate appeals if he wanted to complain about staff misconduct – does not give rise to any § 1983 liability because prison officials may require inmates to comply with regulations that have established procedures for recurring issues without violating an inmate's constitutional rights. *See Resnick v. Adams*, 348 F.3d 763, 770 (9th Cir. 2003) (prison had a legitimate governmental interest in the orderly administration of a program that allowed prisons to accommodate the needs of thousands of prisoners and that “[a]llowing inmates to make requests outside this system by letters sent to various prison officials would frustrate the orderly administration” of the program).

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Docket # 19 at 4.

1 The statute requires “proper exhaustion” of available administrative remedies, *Woodford v.*
2 *Ngo*, 548 U.S. at 93, and in California that means pursuing an inmate appeal through to receipt of a
3 director’s level decision, Cal. Code Regs., tit. 15, § 3084.7.. Plaintiff did not properly exhaust his
4 available administrative remedies as to his First Amendment claim. Defendant has carried his
5 burden on his motion to dismiss and demonstrated that the CDCR has no record that Plaintiff ever
6 filed an inmate appeal that (a) complained of Defendant’s opening and/or confiscation of Plaintiff’s
7 letter to the warden and (b) received a decision at the director’s level before he filed this action. The
8 claim is unexhausted and cannot be litigated in its unexhausted state.

9 Dismissal of the entire complaint is not necessary when a prisoner has failed to exhaust
10 some, but not all, of the claims included in the complaint. *Jones v. Bock*, 549 U.S. 199, 222-24
11 (2007) (rejecting “total exhaustion-dismissal” rule); *Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir.
12 2005). When faced with a mixed complaint in which the unexhausted and exhausted claims are not
13 intertwined where the plaintiff does not wish to dismiss the entire action, the district court should
14 simply dismiss the unexhausted claim. *See Lira*, 427 F.3d at 1175.

15 Here, Plaintiff’s exhausted and unexhausted claims are not intertwined. The unexhausted
16 claim is alleged in paragraphs 27-29 of the “Facts” section (Docket # 18-1 at 6-7), and paragraph 4
17 of the “Legal Claims” section (Docket # 18-1 at 10). The unexhausted First Amendment claim is
18 **DISMISSED**. This dismissal is without prejudice to Plaintiff filing a new action asserting the First
19 Amendment claim if he ever satisfies the exhaustion requirement.

20 B. The Retaliation Claim Is Adequately Pled By The *Pro Se* Litigant

21 1. Rule 12(b)(6) Standards

22 Federal Rule of Civil Procedure 12(b)(6) permits a defendant to move to dismiss on the
23 ground that there is a “failure to state a claim upon which relief may be granted.” A motion to
24 dismiss should be granted if plaintiff fails to proffer “enough facts to state a claim to relief that is
25 plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (abrogating *Conley*
26 *v. Gibson*, 355 U.S. 41 (1957)). The court “must accept as true all of the factual allegations
27 contained in the complaint,” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), and must construe *pro se*
28 pleadings liberally, *Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010). The court need not

1 accept as true allegations that are legal conclusions, unwarranted deductions of fact or unreasonable
 2 inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, *amended*, 275 F.3d 1187 (9th
 3 Cir. 2001). In considering a motion to dismiss, the court may take judicial notice of matters of
 4 public record outside the pleadings. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th
 5 Cir. 1986).

6 2. Analysis

7 “Within the prison context, a viable claim of First Amendment retaliation entails five basic
 8 elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because
 9 of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his
 10 First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional
 11 goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted).

12 Defendant urges in his motion to dismiss that Plaintiff’s amended complaint fails to allege
 13 facts showing any of these elements of a retaliation claim other than the existence of protected
 14 conduct by the prisoner. Defendant’s argument fails to persuade the Court.³

15 Plaintiff’s amended complaint is adequate to plead a retaliation claim. Plaintiff adequately
 16 alleges adverse action, i.e., an excessively vigorous and long search of his cell as well as his
 17 placement in a cell with a Lexan front. *See Docket # 18-1 at 5-6* (“excessive cell search” that led
 18 him to ask “why his cell was being searched for so long”), and 7-8 (Plaintiff was told he was moved
 19 to a restrictive cell upon Defendant’s order). The amended complaint also sufficiently alleges that
 20 the adverse action was caused by his First Amendment activity. Plaintiff allegedly was told by a
 21 correctional officer that “IGI had ordered him to ‘strip and search plaintiff’s cell real good’” and that

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 24 ³ This portion of Defendant’s motion seeks to have the Court revisit a decision already made,
 25 as the Court already had determined that the complaint and amended complaint *did* state a claim
 26 upon which relief may be granted with regard to the retaliation claim. *See Docket # 4 at 6; Docket #*
 27 *19 at 4*. This determination was made during the initial screening of the complaint and amended
 28 complaint under 28 U.S.C. § 1915A, which requires the court to dismiss, among other things, any
 claims that “fail to state a claim upon which relief may be granted.” A pleading challenge
 following a § 1915A screening of a prisoner complaint rarely will be successful, especially in light
 of the requirement that *pro se* complaints be liberally construed. *See Hebbe v. Pliler*, 627 F.3d 338,
 342 (9th Cir. 2010) (even after Supreme Court cases heightened the standards for pleading, the
 court’s obligation “remains, ‘where the petitioner is *pro se*, particularly in civil rights cases, to
 construe the pleadings liberally and to afford the petitioner the benefit of any doubt.’”)

1 the officer told him the search was “conducted as a scare tactic for a problem inmate.”” Docket #
2 18-1 at 5-6. Later, Plaintiff allegedly learned from another officer that Defendant was the person
3 who ordered the cell search. Additionally, the correctional officer who conducted the extra-vigorous
4 search allegedly told him that the “IGI used” him “to try and scare you into dropping your
5 complaint” (referring to plaintiff’s complaint against officer Burris).” Docket # 18-1 at 6. That
6 suffices to allege a causal connection between the First Amendment activity and the alleged
7 retaliatory action ordered by Defendant. Defendant provides no legal authority for his suggestion
8 that the retaliating actor must have been the same person about whom the prisoner filed an inmate
9 appeal; that argument goes to the credibility of Plaintiff’s theory of a causal link rather than the legal
10 adequacy of Plaintiff’s claim. One can reasonably infer that the extra-vigorous cell search and move
11 to a cell with a Lexan front that allegedly were ordered to scare Plaintiff to drop his complaint did
12 not reasonably advance a legitimate correctional goal, giving the *pro se* pleading the liberal
13 construction to which it is entitled. Defendant’s argument that cell searches serve legitimate
14 correctional purposes is misplaced because the Rule 12(b)(6) motion tests the adequacy of the
15 pleading, not the plaintiff’s ability to prove his claim. Defendant is free to present *evidence* at the
16 summary judgment stage and, if a trial is needed, at the trial to demonstrate that the cell search and
17 move were done to further legitimate correctional goals, but merely positing that cell searches can
18 promote legitimate correctional goals does not show the plaintiff’s amended complaint to be facially
19 deficient. The vigorous cell search and the later move to a cell with a Lexan front, both allegedly
20 done at the behest of Defendant, provided facts sufficient to allege the required chilling effect.

21 *See Rhodes*, 308 F.3d at 569 (destruction of inmate’s property and assaults on the inmate enough to
22 chill inmate’s First Amendment rights and state retaliation claim, even if inmate filed grievances and
23 a lawsuit). The fact that the plaintiff continued to engage in First Amendment activity does not
24 negate the chilling effect. *See generally Rhodes*, 408 F.3d at 569 (“Because ‘it would be unjust to
25 allow a defendant to escape liability for a First Amendment violation merely because an unusually
26 determined plaintiff persists in his protected activity,’ [the prisoner] does not have to demonstrate
27 that his speech was ‘actually inhibited or suppressed.’”).

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1 Giving the *pro se* amended complaint the liberal construction to which it is entitled, the
2 Court concludes once again that Plaintiff has stated a claim upon which relief may be granted for
3 retaliation. The Rule 12(b)(6) motion to dismiss the retaliation claim must be denied. An important
4 caveat to the *pro se* plaintiff: The Court has merely determined that the amended complaint is
5 legally sufficient to allege a retaliation claim. The Court has not made any determination about
6 Plaintiff's ability to *prove* his claim.

7 Defendant also urges that he is entitled to qualified immunity on the retaliation claim. To
8 determine whether an official is entitled to qualified immunity, the Court must decide whether the
9 facts alleged show the official's conduct violated a constitutional right; and, if so, whether it would
10 be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Saucier*
11 *v. Katz*, 533 U.S. 194, 201-02 (2001); *see also Pearson v. Callahan*, 555 U.S. 223 (2009)
12 (overruling *Saucier*'s requirement that qualified immunity analysis proceed in a particular
13 sequence). Defendant's argument that he is entitled to qualified immunity is premised on his belief
14 that the amended complaint failed to allege a constitutional violation. That premise is wrong as
15 explained in the preceding paragraphs. Also, accepting the allegations as true, no reasonable officer
16 would have thought it lawful to retaliate against an inmate for his First Amendment activity. Thus,
17 Defendant is not entitled to qualified immunity at the pleading stage.

18 C. Miscellaneous Motions

19 Plaintiff's third motion for appointment of counsel (Docket # 27) is **DENIED** for the same
20 reasons given for the denial of his second motion for appointment of counsel. *See* Docket # 8.

21 Plaintiff's motion to hold the ruling on the motion to dismiss in abeyance while he gathers
22 evidence to prove the merits of the claims in his amended complaint is **DENIED** as unnecessary.
23 (Docket # 28.) Defendant's motion to dismiss did not call upon Plaintiff to prove his case. Plaintiff
24 did not need to conduct discovery about the merits of his claims to oppose the motion to dismiss that
25 challenged the sufficiency of the pleading and the adequacy of his efforts to exhaust administrative
26 remedies.

27 Plaintiff's "motion to include plaintiff's declaration in support of plaintiff's opposition to
28 defendant's motion to dismiss" is **GRANTED** in that the Court has considered the tardy material.

1 For future purposes, Plaintiff is cautioned that late evidence is generally not accepted, especially
2 when (as here) that evidence was well within the Plaintiff's knowledge and control at the time the
3 opposition was due.

4 **III. CONCLUSION**

5 For the foregoing reasons, Defendant's motion to dismiss is **GRANTED** as to the First
6 Amendment claim and **DENIED** as to the retaliation claim. (Docket #22.) The First Amendment
7 claim is dismissed without prejudice to Plaintiff filing a new action asserting that claim if he ever
8 satisfies the exhaustion requirement for it.

9 Plaintiff's motion to appoint counsel and motion to hold the ruling in abeyance the ruling on
10 the motion to dismiss are **DENIED**. (Docket # 27 and # 28.)

11 In order to move this action toward resolution, the court now sets the following briefing
12 schedule for any motion for summary judgment or other dispositive motion:

13 a. No later than **March 21, 2014**, Defendant must file and serve a motion for
14 summary judgment or other dispositive motion. If Defendant is of the opinion that this case cannot
15 be resolved by summary judgment or other dispositive motion, Defendant must so inform the Court
16 prior to the date the motion is due.

17 b. Plaintiff's opposition to the summary judgment or other dispositive motion
18 must be filed and served upon Defendant's counsel no later than **April 18, 2014**.

19 c. Defendant's reply brief, if any, must be filed and served no later than **May 2,**
20 **2014.**

21 Plaintiff is reminded to read the *Rand* notice regarding summary judgment motions that was
22 included at page 8 of the order of service. Defendant also must provide a *Rand* notice regarding
23 summary judgment motions at the time he files and serves his motion for summary judgment.

24 IT IS SO ORDERED.

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26 Dated: January 29, 2014

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EDWARD M. CHEN
United States District Judge